

KERRY ERICKSON,)	AGBCA No. 99-151-3
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Appellant)	
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Representing the Appellant:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

September 2, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

Kerry Erickson (contractor) of Hayden Lake, Idaho, filed this appeal with the Board on March 15, 1999. The respondent is the U. S. Department of Agriculture, Forest Service (Government). The dispute involves a contract, No. 52-04M3-8-0018, for tree thinning in the Wallowa Valley Ranger District of the Wallowa-Whitman National Forest in Oregon. For each of 20 units of tree thinning (covering an estimated 586 acres), the contract specifies an estimated average number of trees per acre to be cut, and an estimated range of trees per acre to be cut. The numbers are qualified with specific language: "This is an estimate based on survey plots and may vary by + or - 20%."

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The contractor has elected the accelerated procedure. 41 U.S.C. § 607(f); Rule 12.3. (This opinion is issued 171 calendar days after filing and 163 calendar days after receipt, and after snow had melted on site to permit a resurvey of an area.) The parties elected to submit the case pursuant to Board Rule 11, without a hearing and without briefs.

The contractor seeks to recover an additional amount for those units it contends contained trees far in excess of the contract estimates. Also, the Government assessed \$1,096.67, as increased administrative costs incurred because the contractor did not finish on time, in lieu of terminating for

default. The contractor seeks a refund of this amount, as it maintains that poor Government estimates required increased contractor work and additional time. In arriving at its estimated number of trees per acre, the contractor states that it utilized the hours spent per unit, the tanks of gas used, and the estimated number of trees cut per tank of gas three times per day.

In an attempt to resolve the dispute, the Government agreed to resurvey a unit of the contractor's choosing. The results of the survey were consistent with the numbers represented in the request for quotations and contract. The record fails to demonstrate a basis for recovery on the contractor's claim.

The record supports the assessment of damages by the Government only in the amount of \$400. The remainder of the assessment appears to be for costs the Government would have incurred under the contract, but at an earlier time. Therefore, that portion of the assessment does not represent excess costs. The contractor is entitled to \$696.67, plus interest as provided in the CDA.

Accordingly the Board grants in part the appeal.

FINDINGS OF FACT

The request for quotations and the contract

1. On May 1, 1998, the Government issued a request for quotations to obtain tree thinning, slash treatment, and related work in the Wallowa Valley Ranger District in five geographically diverse project areas (Appeal File (AF) at 17, 24 (¶¶ 1, 2)). The request indicates that an indefinite-quantity contract would result for an estimated 536 acres, with a minimum and maximum quantity of 420 and 639 acres, respectively. A single unit price is requested for all of the acres, for the sole item of work. (AF at 17 (¶ 12 (Schedule).)

2. In a thinning unit data sheet, the request for quotations provides information on the 20 units (that is, sub-items) to be thinned (AF at 25 (¶ 3.C.1), 51-52). The request also specifies:

Prospective quoters are solely responsible for making on site inspections for the purpose of determining per unit rates. The Government, while making every effort to to [sic] provide accurate information contained within the Thinning Unit Data Sheet(s), assumes no responsibility in the event a successful quoter failed to make on site inspections for the purpose of cost appraisal prior to submitting their quote. Units shown on the data sheet are representative of units which will be ordered.

(AF at 25 (¶ 3.C.2).)

3. For the 20 sub-items of work, the data sheet contains columns of information, one of which is labeled "EST. AVG. # OF CUT TREES/ AC. AND RANGE" (AF at 51 (column J)). The information is described as follows:

This column expresses the average number of cut trees [that is, trees to be cut, as opposed to those that are to remain] per acre and the estimated range of stems to cut per acre that the contractor should expect on each sub-item. This is an estimate based on survey plots and may vary by + or - 20%.

(AF at 52 (¶ K).) The data sheet also specifies 194 as the average number of trees per acre to remain (AF at 51 (column K)). The data sheet also contains “remarks,” which dictate, in part: “All quoters shall remain responsible for on site inspections for the purpose of determining per unit costs. (Refer to contract clause entitled, DESCRIPTION, paragraph C Thinning Unit Information).” (AF at 52 (column M).)

4. Erickson provided a quotation dated May 15, 1998 (AF at 17). In June, the contracting officer spoke with Erickson, who indicated that he had not looked at the units. Thereafter, Erickson confirmed the quotation price. (AF at 4.)

5. On July 2, 1998, Erickson signed a contract, No. 52-04M3-8-0018, which incorporates the terms of the request for quotations (AF at 16). On August 28, 1998, the contracting officer issued a task order to obtain the work, covering 586 acres, for a total of \$30,706.40 (AF at 14).

The work

6. During performance, the contractor informed the Government that it was not meeting its anticipated production rate because there were more trees than anticipated under the contract¹ (AF at 150, 160-61, 171). The Government did a resurvey of sub-item 1-15; it arrived at numbers within the estimates on the data sheet (AF at 51, 150-55, 157).

7. By letter dated October 26, 1998, the contracting officer informed the contractor that it was in default for failing to complete the work within the time specified. Moreover, “If the contract is not terminated, a revised completion date will be determined. Please provide information on how you would complete the work, including a time schedule. Whether or not this contract is terminated, you may be liable for all excess administrative costs that are incurred.” (AF at 157-58.)

8. By letter dated November 1, 1998, the contractor responded by requesting an extension of time through November 7, “weather permitting and tree estimates.” It concluded that it had to cut 236,000 trees in excess of the contract total for seven identified sub-items, and that “most other areas were within the 20%.” It states, for the tree totals for the seven sub-items:

¹ For one unit, the Government concluded that the estimate was erroneous. A bilateral contract modification increased the per acre price. (AF at 13, 130-32.) For another unit, through a bilateral contract modification, there was a substitution for the designated area (AF at 11). By bilateral contract modification, one unit was deleted from the contract (AF at 10).

Tree totals are arrived at by counting trees cut per tank 3 times per day. The least of which I ever cut was 600 trees/tank in open areas of larger trees. The most I cut was 1800/tank in dog hair thickets. Totals were arrived at by using the time spent in the different type areas.

(AF at 171.)

9. By letter dated November 6, 1998, the contracting officer denied the extension, but did not terminate for default: "I will allow you to continue to perform the work in default. You will be liable for any excess administrative costs that we have incurred. These costs are estimated to be approximately \$1,000." (AF at 172.) The Government assessed the contractor \$1,096.67 for excess administrative costs (AF at 197).

10. The record contains scant information relating to this Government claim for \$1,096.67. In correspondence of November 5, 1998, the contracting officer's representative informs the contracting officer:

When I make out [the contractor's] final payment do you want me to deduct excess contract administration costs? These currently amount to \$966.07, including my time associated after the expiration date of the contract time (10[/]14/98) and \$119.60 vehicle use. I arrived at the figures above using the assumption that everytime I had to go out to meet with [the contractor], inspect sub-items, or resurvey sub-items I was wasting G[overnment] time that would have been focused in a different area had the work been ready for inspection on time. . . .

Please let me know if you think I should'nt charge him for inspections and travel that I would have had to do had he been on time. That would reduce excess costs to around \$400 total.

(AF at 170). The two figures (\$966.07 and \$119.60) total \$1,085.67. The record does not reveal how the Government arrived at \$1,096.67.

The dispute

11. After completion of performance, the contractor submitted a claim for an extension of time, a price increase, and a refund of the Government's assessment. In total, the contractor sought \$19,686.67. For seven of the sub-items thinned under the contract, the contractor contends that the actual trees to be thinned far exceeded (by 230,000 trees) the estimates in the contract. The contractor utilized its tree count per tank of gas methodology (Finding of Fact (FF) 10), as the basis for arriving at the number of trees. (AF at 201.)

12. The contracting officer denied all portions of the claim, received December 7, 1998 (AF at 201, 206-10).

13. On March 15, 1999, the contractor filed its appeal with this Board. The appeal contains a “revised and corrected claim” seeking a total of \$12,105.81, comprised of \$11,009.24 (for 170,000 trees) and \$1,096.67 (as a return of the Government assessment). The revised claim substitutes one of the units in the original claim, but utilizes the same methodology.² (AF at 211-13.)

The post-dispute resurvey

14. In an attempt to resolve the dispute, the Government agreed to resurvey a unit of the contractor’s choosing. The contractor selected sub-item 1-15 for another resurvey (a resurvey subsequent to that previously discussed, FF 6). Per acre, the contract estimates the average number of trees to be cut as 450; with the plus or minus variation of 20 percent, this 450 could be as high as 540 (AF at 51-52; FF 3). The contract estimates the number of trees to remain as 194 per acre. The total of these figures (540 + 194) is 734 trees per acre.

15. The contractor attended the first, but not the second, day of the resurvey conducted on July 6-7, 1999. Throughout the unit, 94 plots were designated, each of the size of 1/100th acre. The trees (and stumps) within each plot were counted. The total number of trees (and stumps) was 690 for the 94/100th acres of the plots. This amounts to 734 trees per acre. (AF at 227-28, 233-36.)

16. While the figures from the resurvey for some of the 1/100th acre plots suggest that the number of trees in a given acre could be greater than the maximum range of the estimate (plus the 20 percent), the record does not contain enough information on any given acre to conclude that the estimated ranges were inaccurate.

17. Based upon the existing record, the Board finds the contractor’s methodology for estimating tree counts (FF 8) to be lacking in reliability. The record does not demonstrate that the estimates in the contract are inaccurate for any of the units for which the contractor seeks relief.

DISCUSSION

This appeal involves a contractor claim for additional time and money, and a Government claim for assessed extra administrative costs.

The contractor has failed to establish a necessary element of its claim. Namely, the record reveals no inaccuracy in the estimates found in the contract of trees to be cut (FF 17); therefore, the Board’s inquiry and analysis need probe no further. The figures for the twice resurveyed sub-item, 1-15, are within the accuracy of the data sheets. (FF 6, 14, 15). Lacking in reliability is the contractor’s

² Although the contractor utilizes the same methodology for relief, it had not presented to the contracting officer a claim involving the substituted sub-item. As discussed during a telephone conference involving the Board and parties on April 15, 1999, without a claim and request for a decision by the contracting officer, the Board lacks jurisdiction to resolve this aspect of the revised claim.

methodology for determining the number of trees that were cut (FF 17). Without a showing of inaccurate Government estimates, there is no basis to reform the contract as the contractor suggests.

The Government's assessment of excess procurement costs is not fully supported by the record. Without an extension of time, the contractor did not timely perform. However, as revealed in the correspondence by the contracting officer's representative (FF 10), a portion of the assessed costs would have been incurred by the Government had the contract been performed timely. Thus, only \$400 represents excess costs of procurement for which the contractor can be liable. The contractor is entitled to recover the remainder (\$696.67) of the assessment, plus interest pursuant to the CDA, from December 7, 1998. (41 U.S.C. § 611; FF 12.)

DECISION

The Board grants in part the appeal. The Board denies the contractor's claim for repricing the acres or extending the time for performance. The record supports the Government's claim for excess administrative costs only in the amount of \$400. The contractor is to recover \$696.67, plus interest.

JOSEPH A. VERGILIO
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
September 2, 1999